IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BRUNO R.,	)	
	)	2 CA-JV 2007-0051
Appellant,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ARIZONA DEPARTMENT OF	)	Rule 28, Rules of Civil
ECONOMIC SECURITY,	)	Appellate Procedure
MARITZA R., and BRUNO R.,	)	
	)	
Appellees.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 14963000

Honorable Virginia C. Kelly, Judge

AFFIRMED

Linda R. Herzog

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Pennie J. Wambolt

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

V Á S Q U E Z, Judge.

¶1 Appellant Bruno R. appeals from the juvenile court's order of June 28, 2007, terminating his parental rights to Maritza, born in October 1999, and Bruno (hereafter Bruno Jr.), born in January 2001. The court ordered termination on the ground that Bruno had been convicted of a felony and, consequently, deprived of his civil liberties and incarcerated for so long as to deprive the children of a normal home for a period of years (a seventy-five-month prison term imposed in May 2006), A.R.S. § 8-533(B)(4), and on the ground that he had neglected or willfully abused a child, § 8-533(B)(2). Bruno contends there was insufficient evidence to support the termination of his rights on either statutory ground. He also maintains there was insufficient evidence that termination of his parental rights was in the children's best interests. We affirm for the reasons stated below.

¶2 A person's parental rights may not be terminated unless there is clear and convincing evidence of at least one ground set forth in § 8-533(B). *See* A.R.S. § 8-537(B); Ariz. R. P. Juv. Ct. 66(C); *Jennifer G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 450, ¶ 12, 123 P.3d 186, 189 (App. 2005). Additionally, the evidence must establish by a preponderance that termination of the parent's rights is in the child's best interests. *See Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 22, 110 P.3d 1013, 1018 (2005). When the juvenile court sits as the trier of fact in such proceedings, it is charged with weighing the evidence and assessing the credibility of witnesses; therefore, on review we accept the factual findings that are the bases for the court's termination order so long as there is reasonable evidence to support those findings, and we will not disturb the court's ruling unless it is clearly erroneous. *See*

Michael J. v. Ariz. Dep't of Econ. Sec., 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000); *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997).

¶3 The record establishes Maritza was removed from the home by Child Protective Services (CPS) soon after her birth in October 1999 because, inter alia, she had tested positive for cocaine and was in critical condition; the mother had tested positive for cocaine and marijuana; the home was unsuitable for the child because it was infested with insects; and Bruno could not care for Maritza because he was incarcerated for driving under the influence of an intoxicant. The Arizona Department of Economic Security (ADES) filed a dependency petition shortly after Maritza was removed from the home. Both parents admitted the allegations in an amended petition. Bruno Jr. was born in January 2001, and he, too, was taken into protective custody. The parents admitted the allegations of an amended dependency petition, and Bruno Jr. was adjudicated dependent in May 2001.

¶4 Bruno and the children's mother participated in services provided by ADES. The children were returned to them, and the juvenile court dismissed the dependency proceeding in April 2002. But in September 2005, CPS again removed the children from the home after law enforcement officers raided the home while investigating Bruno for suspicion of harboring illegal aliens. Bruno was arrested for possession of narcotics and illegal weapons. The children were again adjudicated dependent as to both parents after the mother admitted, and Bruno pled no contest to, the allegations in an amended petition. The allegations included that the children had been at home when the house was raided and

Bruno was arrested; the home was "run down, with holes in the floor, cockroaches . . . [; and] [t]he children appeared to be malnourished and unkempt with head lice." ADES further alleged it was not in the children's best interests to remain in the home because "[t]he parents have issues relating to substance abuse, neglect of the children, failure to maintain a safe living environment, physical abuse of the children, housing illegal aliens, narcotics possession, and their own current criminal concerns . . . ."

¶5 The initial case plan goal was reunification of the family, and the juvenile court repeatedly found ADES was making reasonable efforts to implement that plan by providing the parents a panoply of services. After a two-day permanency hearing held in September 2006 and January 2007, the court found Bruno was not in compliance with the case plan because he was incarcerated and the mother was only in partial compliance. The court found it "necessary and appropriate" to change the case plan goal to severance and adoption. ADES filed a motion for termination of the parent-child relationship as to both parents in February 2007. In April 2007, the mother relinquished her parental rights to the children, and the court subsequently terminated her rights pursuant to that relinquishment after finding severance was in the children's best interests.

¶6 After a two-day termination hearing in May 2007, the juvenile court severed Bruno's parental rights on both grounds ADES had alleged in its motion: incarceration for a felony conviction and neglect or willful abuse of a child. The evidence presented at the hearing included the testimony of Pam Robinson, the children's therapist. Robinson

testified that the children had been placed in a secure, loving home with the mother's cousin and were thriving. The relative wished to adopt the children, which Robinson believed to be in the children's best interests. Robinson acknowledged the children had a relationship with Bruno. She stated that, nevertheless, it was in their best interests for Bruno's rights to be terminated because the home he had provided before he was incarcerated had made the children feel unsafe and insecure. In contrast, she testified, their current placement was "normal," meaning that the children felt safe and secure with the maternal cousin. Robinson testified further that the children needed permanency and that it would be deleterious for them to wait "in limbo" for Bruno to be released from prison.

¶7 CPS caseworker Sarah Flaten testified about the circumstances that had caused the children's second removal from the home in September 2005. The house was unsafe, the children were malnourished, and Maritza had a severe case of head lice. Both parents had been abusing substances, particularly cocaine, and engaging in illegal activity, including "trafficking or housing illegal immigrants." Flaten described the kinds of services ADES had provided Bruno and noted that, although he had partially complied with the case plan, he was not in compliance when he was sentenced to prison in May 2006. Flaten specified that Bruno had only sporadically submitted to urinalysis for drug testing as required. Flaten also testified she did not believe the children had a strong relationship with Bruno before he was incarcerated. Nor did she believe Bruno could have a relationship with the children, much less parent them, while in prison. She explained that, although there could be some

communication between them, it would necessarily be minimal, and it was highly unlikely there would be in-person visits. In Flaten's opinion, Bruno's incarceration would deprive the children of a normal home life for a period of years because he would not be "able to exert any type of care or control over the children, and the children definitely need to be in a place where they know what to expect . . . and have a parent present in the home with them."

¶8 Like Robinson, Flaten testified the children's placement with the maternal cousin who wished to adopt them was in their best interests. She also agreed it would be detrimental to the children if Bruno's rights were not terminated because of the "potential threat" that they would be returned to his custody after he was released from prison. This "threat" included possible exposure to domestic violence, alcohol abuse, and illegal activities, as well as the possibility that Bruno would be reincarcerated.

¶9 Section 8-533(B)(4) provides that parental rights may be terminated if there is sufficient evidence

> [t]hat the parent is deprived of civil liberties due to the conviction of a felony if the felony of which that parent was convicted is of such nature as to prove the unfitness of that parent to have future custody and control of the child, including murder of another child of the parent, manslaughter of another child of the parent or aiding or abetting or attempting, conspiring or soliciting to commit murder or manslaughter of another child of the parent, or if the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years.

Relying extensively on our supreme court's decision in *Michael J. v. Arizona Department of Economic Security*, 196 Ariz. 246, 995 P.2d 682 (2000), Bruno contends there was insufficient evidence to support the court's order on this ground because there was evidence that he had a positive relationship with the children and that he loves them; there was evidence that the relationship could continue, despite his incarceration, through visits and telephone calls; and the children would not be deprived of a normal home because they had a normal home life with the maternal cousin and could alternatively have a normal life with Bruno's sister, who would take the children if their present placement could not continue. Bruno suggests, too, that the juvenile court incorrectly applied *Michael J.*

¶10 In *Michael J.*, our supreme court rejected the notion that a parent's incarceration is an automatic defense to a motion or petition to sever the parent's rights on the ground of abandonment, pursuant to § 8-533(B)(1), or that it constitutes abandonment per se. 196 Ariz. 246, ¶¶ 21-22, 995 P.2d at 686. Rather, the court concluded, "incarceration is 'merely one factor to be considered in evaluating the father's ability to perform [his] parental obligations.'" *Id.* ¶ 22, *quoting In re Pima County Juv. Action No. S-624*, 126 Ariz. 488, 490, 616 P.2d 948, 950 (App. 1980). The court found the juvenile court had correctly concluded there was sufficient evidence in that case that the father had abandoned the child. The juvenile court had also terminated the father's rights based on his conviction of a felony and the 3.5-year prison term imposed, about one year of which was remaining at the time of the hearing. *Id.* ¶ 28. The supreme court rejected the determination

by this court that the father's prison term could not, as a matter of law, be sufficiently lengthy to justify termination of his parental rights. The court stated the statute "sets out no 'bright line' definition of when a sentence is sufficiently long to deprive a child of a normal home for a period of years, and . . . the better approach is to consider each case on its particular facts." *Id*. ¶ 29. The court provided the following guidance to juvenile courts in applying § 8-533(B)(4):

> [Juvenile courts] should consider all relevant factors, including, but not limited to: (1) the length and strength of any parent-child relationship existing when incarceration begins, (2) the degree to which the parent-child relationship can be continued and nurtured during the incarceration, (3) the age of the child and the relationship between the child's age and the likelihood that incarceration will deprive the child of a normal home, (4) the length of the sentence, (5) the availability of another parent to provide a normal home life, and (6) the effect of the deprivation of a parental presence on the child at issue. After considering those and other relevant factors, the trial court can determine whether the sentence is of such a length as to deprive a child of a normal home for a period of years.

Id.

¶11 We agree with ADES, and reject Bruno's argument to the contrary, that the juvenile court in this case considered the factors articulated in *Michael J*. and did so appropriately. Additionally, there is reasonable evidence in the record to support the factual findings that sustain the court's termination of Bruno's rights on this ground. Bruno had been arrested in August 2005 after law enforcement officers raided the home. He was released in September, incarcerated again in January 2006, and released on February 17,

2006. But he was reimprisoned at the end of May 2006 after being convicted in federal court of two counts of conspiracy to transport illegal aliens for profit, sentenced to concurrent, seventy-five-month prison terms, and sent to a federal prison in Texas.

¶12 The juvenile court expressly referred to *Michael J.* in its termination order, considering in turn each of the factors prescribed by our supreme court. Addressing "the length and strength of any parent-child relationship existing when incarceration began," the court noted the periods of Bruno's incarcerations and found he had "engaged in criminal activities . . . in the home in the children's presence." The court further found he had abused alcohol and cocaine and engaged in domestic violence in the children's presence. "At best," the court found, Bruno "was sporadically involved in a positive way with his children." Maintaining there was insufficient evidence to support the termination of his rights on this ground, Bruno focuses on his professed love for the children and points to evidence demonstrating that they loved him. But the court acknowledged such evidence in its order, commenting that the children had "expressed love for their father and he has demonstrated that he can have appropriate visitation with them," noting there was "some type of positive relationship . . . in spite of the dysfunctional and criminal activity in the home." Clearly, the court took this fact into account when considering the circumstances in their entirety.

¶13 Turning to the second factor set forth in *Michael J.*, the juvenile court noted it would be possible for Bruno to maintain a relationship with the children through

telephone calls and letters and observed that Bruno had enrolled in parenting classes. But the court found visitation would be difficult because Bruno is imprisoned in Texas.

¶14 The court next considered the children's ages and the likelihood that Bruno's imprisonment would deprive them of a normal home. The court pointed out that the children had been placed with a relative and that "they [were] loved and their physical and emotional needs [were] being met." The court contrasted that environment with the chaotic home Bruno had provided for the children before they were removed.

¶15 Addressing the fourth factor in *Michael J.*, the juvenile court concluded the prison terms were sufficiently lengthy to justify termination of Bruno's parental rights, particularly given that the children were six and five years old and that Bruno "will have been [incarcerated] about half of each child's life" by the time he is released. The court further found that, because the mother's parental rights had been severed after she relinquished those rights, there was no other parent who could provide the children with a normal home during Bruno's incarceration. Bruno suggests that, because the children have been placed with a relative, they are being provided with a normal home in his absence. But, as the court stated in *Michael J.*, the question is whether another *parent* is available to properly care for the children and provide them with a normal home. 196 Ariz. 246, ¶ 29, 995 P.2d at 688. The "normal home' referred to in the statute relates to [the father's] obligation to provide a normal home," not the fact that someone other than the other parent

has been able to do so in the father's absence. *In re Maricopa County Juv. Action No. JS-5609*, 149 Ariz. 573, 575, 720 P.2d 548, 550 (App. 1986).

¶16 Bruno's suggestion that the juvenile court erred by not considering the possibility that he could be released before completing the seventy-five-month term is incorrect. *See James S. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 351, n.3, 972 P.2d 684, 687 n.3 (App. 1998). Additionally, the court correctly considered all periods of incarceration, not just the federal sentence of imprisonment. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 8, 53 P.3d 203, 206 (App. 2002).

¶17 Considering the final factor set forth in *Michael J.*, the juvenile court found the children had "adjusted to life in their maternal relative's home." The court concluded: "They are in a far better situation now than when Father was out of custody and it would not be to their benefit to leave the safe and loving home they now have to resume the chaotic lives they had with Father."

¶18 Bruno points to evidence that he had a relationship with the children, insisting it would have been possible to maintain that relationship while he was incarcerated as if that somehow negates the fact that ADES established the elements of § 8-533(B)(4). But as we previously said, the juvenile court was well aware of that evidence and clearly considered it, as its finding on the second *Michael J.* factor clearly reflects. It was for the court to weigh that evidence against the abundance of other evidence; we will not reweigh the

evidence, which is essentially what Bruno is asking us to do. *Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205.

¶19 Additionally, early in his opening brief, before specifically addressing each of the two grounds upon which the juvenile court ordered termination, Bruno states generally that the order cannot be sustained because ADES "did not make all reasonable efforts to preserve the family relationship." As we noted above, the court repeatedly found ADES was providing appropriate services designed to reunify the parents with the children, and Bruno did not challenge those findings. And, § 8-533(B)(4)—unlike subsections (B)(8) and (B)(11)—does not impose on ADES a duty to provide reunification services before a parent's rights may be terminated on that ground.

¶20 As this court noted in *James H. v. Arizona Department of Economic Security*, 210 Ariz. 1, ¶ 6, 106 P.3d 327, 328 (App. 2005),

> the legislature in 1998 amended the introductory language of A.R.S. § 8-533(B) to delete therefrom the requirement that the court consider "the availability of reunification services to the parent and the participation of the parent in these services" for *all* grounds for severance. 1998 Ariz. Sess. Laws, ch. 276, § 13. This deletion can be read as an affirmative legislative decision that reunification services are not required in the context of a subsection (B)(4) severance.

¶21 The court suggested in *James H.* that ADES might have a constitutional "obligation . . . to engage in reunification efforts," relying, in part, on its decision in *Mary Ellen C. v. Arizona Department of Economic Security*, 193 Ariz. 185, ¶ 32, 971 P.2d 1046, 1052-53 (App. 1999). *James H.*, 210 Ariz. 1, ¶ 8, 106 P.3d at 328. But Bruno has not

made that argument. Even had he done so, as the court noted in *James H.*, reunification efforts are not required when they would be futile and there is no "reasonable prospect of success." *Id*. Under the circumstances of this case, further reunification efforts after Bruno was incarcerated in Texas would be futile as a matter of law. As the court found and as the record shows, even before he was sentenced to prison in May 2006, Bruno had complied only partially with the case plan. But most importantly, no reunification efforts could change the fact that Bruno's lengthy incarceration will deprive his young children of a normal home life for a substantial period of years.

¶22 Bruno also challenges the juvenile court's finding that terminating his parental rights was in the children's best interests. There is ample evidence in the record that supports this finding, including the testimony of Robinson and Flaten noted above. In particular, their testimony established the children's need for permanency and the benefit to them of knowing their permanent home was with the maternal cousin. The court was well aware of the bond that had existed between Bruno and his children. The court considered that evidence but concluded nevertheless that termination of his rights was in the children's best interests. A preponderance of the evidence supported this finding, *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 22 , 110 P.3d 1013, 1018 (2005); therefore, we have no basis for disturbing it.

¶23 Bruno also challenges the juvenile court's termination of his rights on the ground of neglect or willful abuse. Having found sufficient evidence to affirm the court's

order pursuant to § 8-533(B)(4), however, we need not address that issue. *See Jennifer G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 450, ¶ 12, 123 P.3d 186, 189 (App. 2005) (juvenile court must find at least one ground for termination of parental rights).

¶24 The juvenile court's order terminating Bruno's parental rights to Maritza and Bruno Jr. is affirmed.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge